

JAMES M. WAGSTAFFE (95535)  
IVO LABAR (203492)  
**KERR & WAGSTAFFE LLP**  
100 Spear Street, Suite 1800  
San Francisco, CA 94105-1528  
Telephone: (415) 371-8500  
Fax: (415) 371-0500

Attorneys for Defendant  
**VICTOR CONTE**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

SHANE D. MOSLEY, SR.,

Case No. C 08-01777 JSW

**Plaintiff.**

VS

VICTOR CONTE.

**Defendant**

**REPLY MEMORANDUM IN SUPPORT  
OF MOTION TO STRIKE  
COMPLAINT PURSUANT TO  
CALIFORNIA'S ANTI-SLAPP  
STATUTE [C.C.P. § 425.16]  
STRATEGIC LAWSUIT AGAINST  
PUBLIC PARTICIPATION ("SLAPP");**

Hearing Date: August 22, 2008  
Time: 9:00 a.m.  
Courtroom: 2

HON. JEFFREY S. WHITE

1  
**TABLE OF CONTENTS**

		<i>Page</i>
1	I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
2	II. ARGUMENT .....	2
3	A. Mosley Concedes That the First Prong of the Anti-SLAPP Statute is Met .....	2
4	B. Mosley Has Failed to Establish a Reasonable Probability that He Will 5 Prevail on the Merits of His Defamation Claim .....	2
6	1. Mosley's Declaration Is Not <i>Prima Facie</i> Evidence of the Falsity 7 of Conte's Statements to the Press .....	2
7	2. There Is No Evidence that Conte's Statements to the Press were 8 Made with Actual Malice .....	4
8	3. Conte's Statements to the Press Were Opinion .....	8
9	4. Conte's Statements to the Press were Privileged .....	9
10	5. The Alleged Defamatory Statements Are Substantially True .....	11
11	C. Conte Is Entitled to Attorneys' Fees .....	12
12	III. CONCLUSION .....	12
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1                   **TABLE OF AUTHORITIES**

		<i>Page</i>
	<b><u>Cases</u></b>	
4	<u>Bose Corp. v. Consumers Union of U.S.</u> , 466 U.S. 485 (1984).....	5
5	<u>Brown v. Kelly Broadcasting Company</u> , 48 Cal. 3d 711 (1989) .....	10
7	<u>California Back Specialists Group v. Rand</u> , 160 Cal. App. 4th 1032 (2008) .....	12
9	<u>Christian Research Institute v. Alnor</u> , 148 Cal. App. 4th 71 (2007) .....	1, 5
10	<u>Copp v. Paxton</u> , 45 Cal. App. 4th 829 (1996) .....	5, 12
12	<u>Emde v. San Joaquin County Central Labor Council</u> , 23 Cal. 2d 146 (1943). ....	11
13	<u>Fox Searchlight Pictures, Inc. v. Paladino</u> , 89 Cal. App. 4th 294 (2001) .....	3
15	<u>Haynes v. Alfred A. Knopf</u> , 8 F.3d 1222 (7th Cir. 1993) .....	11
17	<u>Herbert v. Lando</u> , 441 U.S. 153 (1979).....	4
18	<u>Institute of Athletic Motivation v. University of Illinois</u> , 114 Cal. App. 3d 1 (1981) .....	10
19	<u>Masson v. New Yorker Magazine, Inc.</u> , 501 U.S. 496 (1991).....	11
21	<u>Milkovich v. Lorain Journal Co.</u> , 497 U.S. 1 (1990).....	9
22	<u>Moyer v. Amador Valley Joint Union High School</u> , 225 Cal. App. 3d 720 (1990) .....	8
24	<u>Naantaanbu v. Abernathy</u> , 816 F. Supp. 218 (S.D.N.Y. 1993).....	7, 8
25	<u>New York Times Co. v. Sullivan</u> , 376 U.S. 254 (1964).....	5
27	<u>Newton v. National Broadcasting Co.</u> , 930 F.2d 662 (9th Cir. 1990), <i>cert. denied</i> , 502 U.S. 866 (1991).....	5
28	<u>Overstock.com, Inc. v. Gradient Analytics, Inc.</u> , 151 Cal. App. 4th 688 (2007) .....	6

<u>Saenz v. Playboy Enterprises</u> , 841 F.2d 1309 (7th Cir. 1988) .....	1, 9
<u>Sagan v. Apple Computer</u> , 874 F. Supp. 1072 (C.D. Cal. 1994) .....	8
<u>Sanborn v. Chronicle Pub. Co.</u> , 18 Cal. 3d 406 (1976) .....	9
 <u>Statutes</u>	
Cal. Civ. Code § 47 .....	1, 8, 9, 10
Cal. Code Civ. Proc. § 425.16 .....	2, 12

## **Statutes**

Cal. Civ. Code § 47 .....	1, 8, 9, 10
Cal. Code Civ. Proc. § 425.16 .....	2, 12

1       **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2           Mosley's opposition is premised on the notion that the Court is prevented from granting  
 3 Conte's motion because Mosley and Conte have differing recollections regarding the events at a  
 4 single meeting that occurred more than five years ago during which Mosley admittedly used  
 5 illegal performance enhancing drugs. That premise is wrong. Mosley's declaration falls far  
 6 short of providing the evidence needed to support the defamation claims he has pled against  
 7 Conte. Given that Mosley's declaration is the *only* evidence that Mosley has offered to establish  
 8 a "reasonable probability" of prevailing on the merits of his claims for defamation, Defendant's  
 9 motion to strike should be granted.

10          Mosley's declaration is not evidence that Conte's challenged statements to the press are  
 11 provably false. For example, Mosley offers no evidence to refute Conte's assertion that he  
 12 "watched [Mosley] inject [himself]" with illegal drugs. Because Mosley does not, and cannot  
 13 prove that Conte's challenged statements are false, he does not have a "reasonable probability"  
 14 of prevailing on his defamation claim.

15          Similarly, there is no evidence of actual malice. Mosley has merely produced evidence  
 16 that he has a different memory of his meeting with Conte in 2003. That is not "clear and  
 17 convincing" evidence that Conte was fabricating his statement to reporters in 2008 that Mosley  
 18 "knew exactly what he was doing" when he was injecting steroids in front of Conte. Christian  
 19 Research Institute v. Alnor, 148 Cal. App. 4th 71, 84-85 (2007).

20          Mosley's claims also fail because Conte's statements can only be construed as protected  
 21 opinion, and not as factual assertions. Conte's statement regarding Mosley's knowledge of his  
 22 drug use is not a statement that can be proven true or false because what Mosley "knew" in 2003  
 23 is entirely within Mosley's state of mind. Saenz v. Playboy Enterprises, 841 F.2d 1309, 1318 n.  
 24 3 (7th Cir. 1988).

25          In addition, Mosley has not demonstrated a reasonable probability of prevailing on his  
 26 claims because Conte's challenged statements to the press fall squarely within the common  
 27 interest privilege set forth in California Civil Code section 47(c). Cal. Civ. Code § 47(c).  
 28 Finally, Conte's statements regarding Mosley are "substantially true." The gist, or sting, of

1 Conte's statements is that Mosley is a drug user who violated the rules of his sport. Mosley is an  
 2 admitted drug user. It simply does not matter whether he did it knowingly or not. As explained  
 3 in detail below, Conte's motion should be granted.

4 **II. ARGUMENT**

5 **A. MOSLEY CONCEDES THAT THE FIRST PRONG OF THE ANTI-SLAPP STATUTE IS  
 6 MET**

7 Mosley admits that Conte's statements to the press were made in a public forum and that  
 8 the statements were made "in connection with an issue of public interest." Cal. Code Civ. Proc.  
 9 § 425.16(e)(3)-(4). Accordingly, Mosley concedes that the first prong of the anti-SLAPP statute  
 10 is met. In light of this admission, the burden shifts to Mosley to establish a probability of  
 11 prevailing on the merits of his underlying claim. Cal. Code Civ. Proc. § 425.16(b)(1).

12 **B. MOSLEY HAS FAILED TO ESTABLISH A REASONABLE PROBABILITY THAT HE  
 13 WILL PREVAIL ON THE MERITS OF HIS DEFAMATION CLAIM**

14 **1. Mosley's Declaration Is Not *Prima Facie* Evidence of the Falsity of  
 Conte's Statements to the Press**

15 Mosley's declaration does not provide evidence that the statements Conte made *to the*  
 16 *press* about Mosley's drug use are false. Mosley wants the Court to read his declaration as  
 17 conflicting with Conte's. However, this motion is not resolved by determining whether or not  
 18 Mosley's recollection could be read to conflict in certain respects with Conte's (or for that matter  
 19 Hudson's). Rather, this motion must be granted unless Mosley's declaration provides evidence  
 20 that the three very specific statements in the complaint are provably false. Those three  
 21 statements are:

- 22     • Conte "watched [Mosley] inject [himself] in front of me;"
- 23     • Mosley "knew precisely what [he was] using;"
- 24     • "[I]t was all explained up front and there was no deception."

25         (*Complaint ¶¶ 12, 24, 34.*)

26 These are the only defamatory statements that Conte is accused of making. Mosley's  
 27 declaration, however, is not evidence that any of the three specific public statements alleged in  
 28 the complaint are false, let alone were made with actual malice.

1 Mosley's declaration is more noteworthy for what it does not say rather than for what it  
 2 does say. Critically, *Mosley does not deny Conte's purported defamatory statement that he*  
 3 *injected himself with the Clear and EPO in front of Conte.* Mosley also does not deny that  
 4 some of the drugs he injected himself with were contained in a bottle labeled "Procrit brand  
 5 EPO," as Conte states in his declaration (*Conte Decl. ¶ 6*). Mosley has offered no evidence  
 6 impugning Conte statement's that he "watched [Mosley] inject [himself] . . ." (*Complaint ¶ 12*).

7 Mosley's silence on this issue is in stark contrast to Conte's, who has unequivocally  
 8 testified that he witnessed Mosley inject illegal drugs. (*Declaration of Victor Conte, ¶ 7*; ("Mr.  
 9 *Mosley injected his first doses of EPO that day in presence of me, Mr. Hudson, and Jim Valente;*  
 10 *¶ 8 "Mosley then administered his first dose of the The Clear under his tongue with a needless*  
 11 *syringe"*). Accordingly, there is no evidence that Conte's statement that he watched Mosley  
 12 "inject himself" is false. It is extremely telling that Mosley did not deny "shooting up" in front  
 13 of Conte, Valente and Hudson. Given that there is no dispute that Mosley "injected himself" in  
 14 front of Conte, Conte's motion to strike must be granted as to this allegation. Fox Searchlight  
 15 Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 308 (2001) (court has discretion to strike  
 16 portions of causes of action).

17 Similarly, Mosley's declaration does not actually refute Conte's other alleged statements  
 18 that Mosley "knew precisely what [he was] using" and "[i]t was all explained up front and there  
 19 was no deception." Mosley's declaration does not deny that Conte told him he was being  
 20 provided with EPO, The Clear, and The Cream. Mosley admits to purchasing these illegal  
 21 products from Conte. (*Mosley Decl ¶ 12*). Mosley does not deny that Conte told him "[T]he  
 22 Clear was an undetectable anabolic steroid." (*Conte Decl. ¶ 5*). Mosley does not deny Conte  
 23 told him that The Cream was "primarily to be used as a masking agent." (*Id.*). Mosley does not  
 24 deny that he injected himself with The Clear with a needleless syringe. (*Id. ¶ 8*). Mosley does  
 25 not deny that he injected himself with drugs from a bottle labeled "Procrit EPO." (*Id. ¶ 6*).  
 26 Instead, Mosley's declaration merely asserts that Conte told him at the meeting in 2003 that the  
 27 drugs were "legal and healthy." (*Mosley Decl. ¶ 10*). That, however, is not evidence that  
 28 Conte's challenged statements to the press in 2008 are provably false. Conte is not accused of

1 telling the press that he told Mosley in 2003 that the drugs were illegal and unhealthy. Conte is  
 2 accused of making the alleged false statements Mosley “knew precisely what he was using.”  
 3 There is no evidence that Mosley did not know “precisely what he was doing,” even if Conte told  
 4 him that the drugs were legal and healthy.

5 Taking Mosley’s declaration at its word, it is entirely consistent that Conte could have  
 6 told Mosley that the drugs were legal and that Conte believed that Mosley “knew exactly what he  
 7 was doing.” Indeed, the undisputed evidence is that Mosley did know what he was doing: (1)  
 8 Mosley made a surreptitious visit to BALCO (*Mosley Decl.* ¶ 5); (2) Mosley injected himself  
 9 with The Clear with a needless syringe and injected himself with drugs from a vial labeled  
 10 “Procrit EPO” (*Conte Decl.* ¶¶ 6-7); (3) Mosley paid for the drugs partially in cash to avoid  
 11 detection (*Mosley* ¶ 12; *Conte* ¶ 11); and (4) Mosley had the drugs shipped to his trainer via  
 12 FedEx because he knew carrying the drugs on a commercial airplane could lead to him getting  
 13 caught. (*Id.*). All of these facts, which Mosley does not deny, led Conte to believe that Mosley  
 14 “knew” that he was taking The Clear, The Cream, and EPO. In the face of Mosley’s admissions,  
 15 whether Conte told Mosley that the drugs were “legal and healthy” has little relevance to Conte’s  
 16 challenged statement that Mosley “knew precisely what he was doing.”

17           **2.       There Is No Evidence that Conte’s Statements to the Press were Made  
 18           with Actual Malice**

19           There is no evidence that the alleged defamatory statements that Conte made to the press  
 20 in 2008 were made with actual malice. Contrary to Mosley’s unsupported assertion, it does not  
 21 follow that if a jury chooses to believe Mosley’s version of the 2003 BALCO meeting (and  
 22 disbelieve the recollections of Conte and Hudson), then a jury must find that the statements that  
 23 Conte made to press in 2008, more than five years after the events in question, were made with  
 24 actual malice.

25           Mosley’s *ipse dixit* argument ignores the high showing that a plaintiff must make in order  
 26 to make a *prima facie* showing of actual malice. Actual malice is a *subjective* standard. *Herbert*  
 27 *v. Lando*, 441 U.S. 153, 170 (1979). The plaintiff must show that the defendant made the  
 28 challenged statement either “with knowledge that it was false or with reckless disregard of

1 whether it was false or not.” New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). The  
 2 existence of actual malice is measured at the time the defamatory statement is made. Id. at 286.  
 3 The test is not what the defendant should have foreseen but what the defendant subjectively  
 4 believed. Newton v. National Broadcasting Co., 930 F.2d 662, 680 (9th Cir. 1990), *cert. denied*,  
 5 502 U.S. 866 (1991). Actual malice must be shown by clear and convincing evidence. Copp v.  
 6 Paxton, 45 Cal. App. 4th 829, 846 (1996) (citation omitted). The clear and convincing standard  
 7 “requires a finding of *high probability*. The evidence must be so clear as to leave no substantial  
 8 doubt. It must be sufficiently strong to command the *unhesitating assent of every reasonable*  
 9 *mind*.” Id. (emphasis added). In making the “actual malice” inquiry, the court *is not* bound to  
 10 view the evidence in the light most favorable to the defendant. Christian Research Institute v.  
 11 Alnor, 148 Cal. App. 4th 71, 84-85 (2007). Instead, the Court must make an independent review  
 12 of the evidence.<sup>1</sup> Id.

13 Mosley’s argument that malice may be inferred when “a story is fabricated by the  
 14 defendant,” begs the question. Here, there is no evidence that Conte’s challenged 2008  
 15 statements to the press were fabricated. Mosley’s declaration does not provide clear and  
 16 convincing evidence that Conte was “fabricating” his 2008 statements to the press regarding  
 17 Mosley’s knowledge of his drug use.

18 Even if that inference could be drawn from Mosley’s declaration, the Court is not bound  
 19 to accept the inferences that arise from Mosley’s declaration in his favor. Alnor, 148 Cal. App.  
 20 4th at 87. Mosley ignores Alnor’s instruction that even if evidence creates an inference of  
 21 fabrication, that inference must be “sufficiently strong to command the unhesitating assent of  
 22 every reasonable mind.” Id. at 86. Here, Mosley’s different recollection of events hardly

---

23  
 24 <sup>1</sup> Mosley misleadingly cites to a portion of the Alnor decision in which the court states that  
 25 it must consider evidence in a light most favorable to the plaintiff. (*Opp. at 9*). That portion of  
 26 the Alnor decision, however, is discussing the standard applicable to determining whether falsity  
 27 has been shown, not actual malice. Alnor, 148 Cal. App. 4th at 84. Alnor makes it painstakingly  
 28 clear that, in keeping with the U.S. Supreme Court’s decision in Bose Corp. v. Consumers Union  
of U.S., 466 U.S. 485, 511 (1984), “a reviewing court is not bound to consider the evidence of  
 actual malice in the light most favorable to respondents . . .” Alnor, 148 Cal. App. 4th at 85  
 (citation omitted).

1 commands the “unhesitating assent” of “every reasonable mind” that Conte fabricated his 2008  
 2 comments, particularly in light of Mosley’s admissions regarding his drug use.

3       Mosley’s citation to Overstock.com, Inc. v. Gradient Analytics, Inc., 151 Cal. App. 4th  
 4 688, 699 (2007) for the proposition that a “declaration” can demonstrate actual malice is  
 5 irrelevant. In Overstock, the defendant, Gradient, issued a scathing report regarding the financial  
 6 health of Overstock, a public company. Overstock sued for defamation and alleged that third  
 7 parties paid Gradient to provide false, negative reports of public companies like Overstock in  
 8 order to profit from the resulting swings in the stock price of the company. Gradient responded  
 9 to the complaint with an anti-SLAPP motion. In opposition to the anti-SLAPP motion, the  
 10 plaintiff submitted a number of declarations, including a declaration from Overstock’s president  
 11 and a declaration from a former employee of the defendant. The declaration from Overstock’s  
 12 president asserted that defamatory statements were “provable false.” Id. at 698. The declaration  
 13 from Gradient’s former employee stated, in essence, that Gradient’s frequently created false  
 14 negative reports in order to satisfy the demands of its clients, regardless of the truth of the  
 15 reports. Id. at 709, 710. The former employee stated “The special reports were not the product  
 16 of an unbiased view of the target companies. Instead, the customer paid for a report that would  
 17 heavily favor its negative view of the target. Nonetheless, Gradient advertised its reports as  
 18 independent and objective.” Id. In short, the former employee’s declaration provided substantial  
 19 evidence that Gradient knew that it was intentionally providing false information. Critically, the  
 20 Overstock court based its finding of a *prima facie* showing of actual malice on the declaration of  
 21 the former employee of the defendant, not the declaration of Overstock’s president’s assertion  
 22 that Gradient’s statements were “provable false.” In other words, the dispositive question is not  
 23 whether a declaration was submitted, but rather what the declaration actually says.

24       Here, Mosley has merely provided evidence that partially controverts Conte and  
 25 Hudson’s recollections of their meeting at BALCO. Mosley’s declaration is not evidence of  
 26 Conte’s subjective mental state at the time he made the alleged defamatory statements to the  
 27 press. It is not evidence that Conte was making knowingly false statements when he responded  
 28 to the inquiries from the press regarding Mosley’s drug use. There is no evidence that Conte’s

1 alleged defamatory statements, namely, Conte “watched [Mosley] inject [himself] in front of  
 2 me;” Mosley “knew precisely what [he was] using;” and “it was all explained up front and there  
 3 was no deception,” were fabricated, nor that Conte did not believe them to be true when he made  
 4 the statements to the press in 2008.

5 This case is more akin to the situation in Naantaanbu v. Abernathy, 816 F. Supp. 218,  
 6 229-30 (S.D.N.Y. 1993). Abernathy was decided under New York law which required a private  
 7 figure plaintiff to show that the defendant was “grossly irresponsible” in making the alleged  
 8 defamatory statement. Id. at 229. In order to make this showing, the Abernathy plaintiff relied  
 9 on her own declaration and that of her sister, which contradicted the defendant’s version of event  
 10 of the night in question from which the defamatory statements arose. The Abernathy court found  
 11 that a plaintiff cannot meet their burden of showing that the defendant acted with a particular  
 12 state of mind simply by offering evidence providing a conflicting version of events:

13 Naantaanbu has not provided sufficient information to  
 14 demonstrate the possibility that Abernathy acted with some degree  
 15 of culpable conduct, if in fact his version of events is false . . . The  
 16 fact of the story’s falsity is not material, however, because  
 17 Naantaanbu has not come forward with any evidence showing  
 18 fault on Abernathy’s part. **She has produced no evidence that**  
**this court may properly consider on a summary judgment**  
**motion that Abernathy told anyone else a different account**  
**that night, or published this account of events with the**  
**realization that his recollection was faulty.** Such evidence is  
 19 required where the applicable standard, gross irresponsibility, calls  
 for a showing of fault.

20 Id. (emphasis added).

21 Here, as in Abernathy, Mosley must make a showing of fault. More specifically, he is  
 22 required to show the highest standard of fault that a plaintiff in a civil case can be made to show:  
 23 clear and convincing evidence of actual malice. Here, as in Abernathy, there is no evidence that  
 24 Conte’s statements to the press, that Mosley injected himself with drugs and that he knew  
 25 precisely what he was doing, were knowingly false when Conte made them or that Conte made  
 26 the statements with the realization that his recollection was faulty. Conte has only made  
 27 consistent statements regarding Mosley’s knowing drug use. There is no evidence that Conte  
 28 published his version of events with the knowledge that his recollection is faulty or that he

1 fabricated the story. Accordingly, as in Abernathy, the plaintiff has failed to meet his burden of  
 2 proof here because there is no evidence of actual malice.

3           **3.       Conte's Statements to the Press Were Opinion**

4           In an acknowledgement that Conte's statements to the press are opinions rather than  
 5 statements of fact, Mosley tries to shift the argument by pointing to factual assertions in Conte's  
 6 declaration to the court. (*Opp. at 11*: "Quite simply, when reviewed in full context, **and when**  
 7 **read in conjunction with Conte's Decl.**, Conte's supposed mere opinion is unquestionably  
 8 based on his factual assertion that "there is no question that I informed Mr. Mosley that he was  
 9 taking the three banned performance enhancing drugs.").

10          Conte is not being sued based on the factual assertions in his declaration. The statements  
 11 in his declaration are absolutely privileged by litigation privilege found in California Civil Code  
 12 section 47(b)(2). Civ. Code § 47(b)(2) ("A privileged publication or broadcast is one made . . .  
 13 in any . . . judicial proceeding."). Thus, the Court should not consider any argument that the  
 14 court must read the defamatory statements at issue in conjunction with other factual statements  
 15 that Conte has made related to this motion to dismiss.

16          The statements at issue here are not the fact of whether Mosley used illegal drugs.  
 17 Mosley has admitted to purchasing and using the drugs at issue. There is no dispute on that  
 18 point. Instead, as explained above, Conte is being sued for three specific statements made to the  
 19 press. The first statement, that Conte "watched [Mosley] inject [himself] in front of me;" is  
 20 arguably a statement of fact. However, Mosley has not provided any evidence that this statement  
 21 is false. The other two allegedly defamatory statements, that Mosley "knew precisely what [he  
 22 was] using;" and "[i]t was all explained up front and there was no deception," are protected  
 23 opinions under the "totality of circumstances" test used in California law. Moyer v. Amador  
 24 Valley Joint Union High School, 225 Cal. App. 3d 720, 725 (1990) *cited with approval in Sagan*  
 25 v. Apple Computer, 874 F. Supp. 1072, 1075 (C.D. Cal. 1994). Under the "totality of  
 26 circumstances" test, the court engages in "a review of the meaning of the language in context and  
 27 its susceptibility to being proved true or false." Moyer, 225 Cal. App. 3d at 725.

28

1       Here, it is not possible to prove as true or false whether Mosley “knew,” at the time he  
 2 was taking The Clear, The Cream and EPO, that the drugs were illegal. Contrary to Mosley’s  
 3 argument, the possibilities here are not constrained by whether or not Conte told Mosley that the  
 4 drugs were illegal. It is equally possible that Conte told Mosley that he was taking illegal drugs  
 5 and that Mosley did not understand, or chose not to understand, that he was taking illegal drugs.  
 6 Mosley’s declaration does not refute key portions of what Conte told Mosley. While it is clearly  
 7 Conte’s opinion that Mosley knew that he was taking illegal drugs, that does not mean that  
 8 Mosley actually knew, nor does it mean that Conte can prove Mosley’s knowledge.

9       Mosley’s efforts to distinguish the cases relied on by Conte are irrelevant because Mosley  
 10 does not dispute the holdings of those cases, namely, that opinions are not actionable. In  
 11 particular, Mosley’s effort to distinguish Saenz v. Playboy Enterprises, 841 F.2d 1309, 1318 n. 3  
 12 (7th Cir. 1988), fails. It is of no consequence that Saenz was decided under New Mexico law or  
 13 that it was decided before Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The court in  
 14 Saenz plainly found that statements about someone else’s knowledge are protected inferences or  
 15 opinions and therefore not actionable. Here, Conte’s challenged statements are clearly protected  
 16 opinions based on what he believed Mosley’s knowledge to be. What Mosley “knew” is not a  
 17 statement that can be proven true or false.

#### 18                  **4.      Conte’s Statements to the Press were Privileged**

19       Mosley argues that privilege found in section 47(c) does not apply to Conte because  
 20 Mosley has demonstrated evidence of actual malice and section 47(c) does not apply to members  
 21 of the news media. Both of these arguments fail.

22       First, for the purposes of section 47(c), malice is shown by evidence of hatred or ill will  
 23 towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in  
 24 the truth of the publication. Sanborn v. Chronicle Pub. Co., 18 Cal. 3d 406, 413 (1976). As  
 25 shown above, Mosley has no admissible evidence of malice. Thus, the conditional nature of the  
 26 section 47(c) privilege is not at issue here because Mosley has not demonstrated any evidence  
 27 that would support a finding of malice.

28

1       Next, the section 47(c) privilege clearly applies to the facts at bar, regardless of whether  
 2 or not the news media can avail itself of the privilege. Section 47(c) provides a privilege for a  
 3 communication to a recipient with a qualifying interest in the communication by a transmitter  
 4 either, first, who also has a qualifying interest in the communication (section 47(c)(1)) or,  
 5 second, who is related to the recipient so as to have a reason to make an “innocent”  
 6 communication (section 47(c)(2)) or, third, whom the recipient asked for the information (section  
 7 47(c)(3)). Cal. Civ. Proc. § 47(c). The last factor plainly applies here because the recipient, the  
 8 reporters to whom Conte spoke, asked for the information from Conte in response to Mosley’s  
 9 claims that Conte deceived him. As Conte explains in his declaration, “I was approached by  
 10 journalists from the New York Daily News, USA Today, and Sports Illustrated and asked to  
 11 respond to Mr. Mosley’s false public comments that I had deceived him about the nature of the  
 12 performance enhancing drugs.” (*Conte Decl.* ¶ 14). Since Conte provided information to  
 13 reporters with whom he shared a common interest, namely, the on-going steroids sports scandal,  
 14 section 47(c) applies. Institute of Athletic Motivation v. University of Illinois, 114 Cal App. 3d  
 15 1, 10-11 (1981) (common interest privilege applies where alleged defamation involves a well-  
 16 known person in a certain interest group).

17       Contrary to Mosley’s assertion, Brown v. Kelly Broadcasting Company, 48 Cal. 3d 711  
 18 (1989) does not prevent the application of section 47(c) to this case. In Brown, the California  
 19 Supreme Court held that a publication or broadcast by a member of the news media to the  
 20 general public regarding a private person is not privileged under Civil Code section 47(c)  
 21 regardless of whether the communication concerns a matter of public interest. Brown stands for  
 22 the proposition that section 47(c) does not provide a blanket public-interest privilege for the *news*  
 23 *media*. That is not the issue here. The question is not whether Sports Illustrated has a section  
 24 47(c) privilege for republishing what Conte told its reporter, but rather whether Conte’s  
 25 statements to the reporter were privileged. The answer to that question is clearly yes. The  
 26 privilege attaches to Conte’s statements, not the republication of the statements by the press.  
 27  
 28

1                   **5.       The Alleged Defamatory Statements Are Substantially True**

2                   Mosley asserts that his declaration creates an issue of fact as to whether Conte's version  
 3 of the 2003 meeting is true. Mosley is mistaken. The issue is not whether Mosley's recollection  
 4 of his meeting with Conte contradicts Conte's recollection. Rather it is whether Conte's  
 5 statements regarding Mosley's drug use are substantially true. A "statement is not considered  
 6 false unless it 'would have a different effect on the mind of the reader from that which the ...  
 7 truth would have produced.'" Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17  
 8 (1991).

9                   Under California law, a defendant need not prove the literal truth of the allegedly  
 10 defamatory accusation,<sup>2</sup> "so long as the imputation is substantially true so as to justify the 'gist'  
 11 or 'sting' of the remark." Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146,  
 12 160 (1943). "The rule of substantial truth is based on a recognition that falsehoods which do  
 13 incremental damage to the plaintiff's reputation do not injure the only interest that the law of  
 14 defamation protects." Haynes v. Alfred A. Knopf, 8 F.3d 1222, 1228 (7th Cir. 1993). Here, the  
 15 "imputation" of Conte's statements is that Mosley is a drug user. That is in fact a true statement.  
 16 Mosley does not deny taking illegal performance enhancing drugs before his bout with Oscar De  
 17 La Hoya. Mosley admits that Conte provided him with EPO, The Clear, and The Cream. In  
 18 fact, Mosley admits to purchasing these illegal products from Conte. (*Mosley Decl ¶ 12*).  
 19 Mosley does not deny that he injected himself with The Clear with a needleless syringe. (*Conte*  
 20 *Decl. ¶ 8*). Mosley does not deny that he injected himself with drugs from a bottle labeled  
 21 "Procrit EPO." (*Id. ¶ 6*). Mosley merely denies that he knew what he was doing at the time he  
 22 was doing it. Even if one takes that incredible assertion at face value, the alleged statements that  
 23 Conte made regarding Mosley's drug use, do not provide a "different effect" on the mind of the  
 24 reader. Simply put, the sting of Conte's comments is that Mosley is a drug user who broke the  
 25 rules of his sport, not that he is an unwitting drug user. Given that Mosley admits to being a drug

27  
 28                   Here, Mosley has proven the literal truth of the alleged defamatory statement that Mosley  
 "injected himself" in Conte's presence.

user, he cannot be heard to argue that Conte's statements regarding him are not substantially true.

### C. CONTE IS ENTITLED TO ATTORNEYS' FEES

Because this motion is well-taken, Conte is entitled to fees and expenses. The “prevailing defendant” on a motion to strike “shall be entitled” to recover his attorneys’ fees and costs. Cal. Code Civ. Proc. § 425.16(c).

Mosley’s argument that he is entitled to fees has no merit. Even if Conte’s motion is denied, a prevailing plaintiff is only entitled to fees where the anti-SLAPP motion is clearly frivolous or designed to delay. California Back Specialists Group v. Rand, 160 Cal. App. 4th 1032, 1038 (2008). This motion is plainly not frivolous, especially in light of the fact that Mosley concedes the first prong of section 425.16(e) is met and Mosley’s utter failure to produce evidence of actual malice, let alone clear and convincing evidence that is sufficiently strong to command the “*unhesitating assent of every reasonable mind.*” Copp, 45 Cal. App. 4th at 846 (citation omitted).

### III. CONCLUSION

16 For the reasons explained above, Defendant Victor Conte respectfully requests that the  
17 Court GRANT his motion to strike Mosley's complaint pursuant to California Code of Civil  
18 Procedure section 425.16.

KERR & WAGSTAFFE LLP

By s/James M. Wagstaffe  
**JAMES WAGSTAFFE**

Atorneys for Defendant  
Victor Conte